U.S. Department of Justice

Immigration and Naturalization Service

V

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: SRC 00 049 50186 Office: Texas Service Center Date: MAR 27 2000

IN RE: Petitioner: [redacted]
Beneficiary

Petition: Petition for Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(H)(ii)(b)

Public Copy

IN BEHALF OF PETITIONER: Self-represented

Identifying
prevent clearly unwarranted
invasion of personal privacy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Terrance M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Texas Service Center, who certified the decision to the Associate Commissioner for Examinations for review. The decision of the director will be affirmed.

The petitioner is a tile installer. It desires to continue the employment of the beneficiaries as tile laborers from May 1, 1999 until an indefinite period. The petition was not accompanied by the required Labor Certification, ETA-750. The director determined that the petitioner failed to submit Form ETA-750 certified by the U.S. Department of Labor. The director also determined that the petitioner did not indicate whether the positions were seasonal, peakload, intermittent or a one-time occurrence. Further, the director decided that the petitioner did not establish that the need for the services to be performed is temporary. The director also decided that the petitioner had not submitted evidence of the beneficiaries being in legal H-2B status prior to the filing of the petition extension. The director certified his decision to the Associate Commissioner for Examinations for review.

Section 101(a)(15)(H)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(H)(ii), defines an H-2B temporary worker as:

> ...An alien having a residence in a foreign country which he has no intention of abandoning, who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country, but this clause shall not apply to graduates of medical schools coming to the United States to perform services as members of the medical profession....

The regulation at 8 C.F.R. 214.2(h)(6)(iv)(A) requires that a petition for temporary employment in the United States be accompanied by a temporary labor certification from the Department of Labor, or notice detailing the reasons why such certification cannot be made.

The regulation at 8 C.F.R. 214.2(h)(6)(iv)(E) states that a petition not accompanied by a temporary labor certification must be accompanied by countervailing evidence from the petitioner that addresses the reasons why the Secretary of Labor could not grant a labor certification.

The petition was filed on December 6, 1999 without a temporary labor certification, or notice detailing the reasons why such certification cannot be made. Absent such certification from the Department of Labor or notice detailing the reasons why such certification cannot be made, the petition cannot be approved.

Further, the petition indicates that the dates of the intended employment are from May 1, 1999 to "current/on-going." The petitioner has not established that the need for the services to be performed is temporary.

Additionally, the petitioner did not submit evidence of the beneficiaries being in legal H-2B status prior to the filing of the petition extension nor did the petitioner indicate whether the beneficiaries' positions was seasonal, peakload, intermittent or a one-time occurrence.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, the petitioner has not met that burden.

ORDER: The decision of the director is affirmed. The petition is denied.